No. ~~1168~~ 69

In the Supreme Court of the United States

October Term, 196~~6~~7

Volkswagenwerk Aktiengesellschaft, petitioner

v.

Federal Maritime Commission and United States of America, et al.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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CITATIONS

264-461—67

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v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA, ET AL.

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MEMORANDUM FOR THE UNITED STATES

Petitioner asks this Court to review the judgment of the United States Court of Appeals for the District of Columbia Circuit sustaining the order of the Federal Maritime Commission in this case. On behalf of the United States,[1] the Solicitor General, believing that the court of appeals' decision was erroneous and that the case meets the criteria for review on certiorari, urges that the petition be granted.

STATEMENT

The facts are stated at length in the various opinions (Pet. App. A; J.A. 611a–658a, 666a–728a), and need

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[1] The United States was a statutory respondent in the court of appeals (see 5 U.S.C. 1034), and is accordingly a party in this Court. It supported the Commission in the court below.

only be sketched here. Petitioner is the manufacturer of Volkswagen motor vehicles, which it ships, chiefly on chartered vessels, to ports on the west coast of the United States. The non-governmental respondents are (1) the Pacific Maritime Association, which is composed of the principal common carriers by water, marine terminal companies and stevedore contractors serving west coast ports, and (2) Marine Terminals Corporation, a member of the Association, employed by petitioner to unload its vehicles. In 1961 the Association entered into an agreement with the International Longshoremen's and Warehousemen's Union, which represents the west coast longshoremen, under which the Association undertook to raise for the longshoremen's benefit a "mechanization fund" of $29 million to cushion the impact on the labor force of installing extensive labor-saving equipment and eliminating featherbedding on the west coast docks.[2] The agreement did not specify, and the union ultimately disclaimed all interest in, how the fund would be raised.

The Association's board of directors determined to implement the agreement by assessing each member an annual rate for each ton of cargo handled, the rate to vary according to the type of cargo. The rate for general cargo was set at 27½ cents per ton and for bulk cargo at 5½ cents. Subsequently, it was decided to assess lumber moving in the coastwise trade

[2] The fund was originally to be completely collected by 1966. That date has been extended, however, to permit enlargement of the fund, and the assessment continues in effect.

at only 2½ cents per ton. The assessment also varied according to whether the base used in computing it was weight tons (2,000 pounds, regardless of volume) or measurement tons (40 cubic feet, regardless of weight). It was decided that the measure used would be that described in the manifest (bill of lading) as of 1959. In the case of automobiles, however, there was no consistent practice, most being manifested, in fact, on a unit rather than on a weight or measurement basis. The board of directors decided, nevertheless, to use the measurement-ton basis for automobiles, as had been done in the case of some other assessments by the Association.

This resulted in an average mech fund assessment per Volkswagen automobile of $2.35 (on a weight-ton basis, the assessment would have been only one-tenth of that amount); and some of the marine terminal companies (principally, respondent Marine Terminals Corporation) and stevedore contractors handling Volkswagen made clear to the Association that they could not absorb this assessment themselves—their total charge for unloading a Volkswagen being, on the average, only $10.45 and their profit $1—and would have to pass it on to petitioner in the form of higher charges for unloading Volkswagens. Petitioner refused to pay the additional charge.

Initially, the Association contemplated suing petitioner directly, but eventually it was decided that it would proceed against the terminal companies in a friendly suit and they would implead petitioner, charging breach of contract. Suit was brought in a

federal district court in California. Petitioner defended on the ground that the mech fund assessment violated the Shipping Act, 46 U.S.C. 801 *et seq.* Since this raised issues within the primary jurisdiction of the Federal Maritime Commission, the administrative agency which enforces the Act, the court stayed the suit to permit a determination of these issues by the Commission. Petitioner then filed a complaint with the Commission, charging that the assessment violated Sections 15, 16 and 17 of the Act. After a hearing in which the Association and Marine Terminal Corporation participated, the Commission ordered the complaint dismissed. 9 F.M.C. 77. The court of appeals sustained the Commission's order by the judgment sought to be reviewed here.[3] 371 F. 2d 747. The California suit remains stayed pending completion of judicial review of the Commission's order. And, as mentioned (n. 2, *supra*), the assessment on Volkswagen automobiles continues.

ARGUMENT

This case presents questions of fundamental importance in the administration of the Shipping Act. The first relates to the scope of Section 15 of the Act, 46 U.S.C. 814. This provision requires all agreements among persons subject to the Act[4]

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[3] Clearly the Commission's order dismissing petitioner's complaint was a "final order" and hence reviewable only by instituting a judicial review proceeding in the court of appeals. 5 U.S.C. 1032; see *Pennsylvania R. Co.* v. *United States*, 363 U.S. 202. No one suggests otherwise.

[4] These include, besides common carriers by water, "any person * * * carrying on the business of forwarding or furnishing

"controlling, regulating, preventing, or destroying competition * * * or in any manner providing for an exclusive, preferential, or cooperative working arrangement" to be filed with the Federal Maritime Commission, which is directed to cancel any such agreement "that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, * * * or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of" the Act. Furthermore, "before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement," and heavy civil penalties are imposed for infractions of this prohibition. Any agreement approved by the Commission is expressly exempted from the antitrust laws.

Section 15 is one of the most powerful deterrents to maritime abuses. By preventing the concealment of concerted action by maritime firms, it forces into the open agreements that might harm shippers or members of the industry. And it empowers the Commission to strike down any such combination if inimical to the commerce of the United States or to the public interest regardless of whether any specific prohibition of law is violated. Section 15 should be construed liberally to effectuate its remedial objectives. Plainly, it encompasses the agreement among the members of the Pacific Maritime Association to impose a special assessment on all cargo handled by

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wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water." 46 U.S.C. 801.

its members for the purpose of defraying the expense of the mechanization fund. The Commission itself conceded that the agreement was within the literal embrace of Section 15: It is an agreement among persons subject to the Act [5] and it provides a cooperative working arrangement for raising the required moneys. We see no reason not to give the statute its literal force in this case.

The Commission suggested that the filing requirement of Section 15 is designed exclusively for the protection of shippers and that there could be no impact on them here in the absence of an agreement among the Association's members to shift the burden of the mech fund assessment to shippers, in the form of higher rates. We challenge both of these propositions. The Shipping Act in general, and Section 15 specifically, are designed to protect carriers and other persons as well as shippers.[6] If the mech fund assessment bore with unfair weight on certain members of the Pacific Maritime Association, the Commission would have a clear mandate to take corrective action.

At all events, it blinks reality to suggest that the agreement fixing the mech fund assessment on automobiles did not have a direct and substantial impact on shippers. Nominally, to be sure, no shipper was liable for the exaction. But the maritime terminal com-

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[5] The Association's carrier members are conceded to be subject to the Act. The Commission assumed as much with regard to the maritime terminal companies. The examiner had specifically so found (J.A. 641a–642a), and we see no substantial question as to the correctness of this finding.

[6] Thus, Section 14 expressly proscribes practices designed to injure competing carriers, and Section 15 itself requires the cancellation of agreements that are unfair "as between carriers."

panies—as they made clear to the Association—could not absorb in its entirety a special assessment equal to 22 percent of their normal charge and more than twice their profit. They had to pass it back to the shipper in the form of a higher charge. An agreement to do so would thus have been superfluous.[7] To require it as a condition of applying Section 15 would exalt form over substance. In our view, any agreement among persons subject to the Act that has a direct and foreseeable effect on the charges paid to such persons by a major shipper must be filed.

We recognize an exception for agreements that relate solely to collective bargaining or labor relations. Cf. *Kennedy* v. *Long Island R.R. Co.*, 211 F. Supp. 478 (S.D. N.Y.), affirmed, 319 F. 2d 366 (C.A. 2),

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[7] Herein lay the error of the court of appeals. It assumed with the Commission that an agreement to impose the assessment on petitioner was necessary to bring the assessment arrangement within the filing requirement of Section 15, and, invoking *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, deferred to the Commission's finding that there was no such agreement. As explained in the text above, such an ancillary agreement is wholly superfluous where it is plain that the assessment, although nominally levied against the terminal company, must, as a matter of economic necessity, be shifted by it to the shipper. Actually, the finding that there was no agreement to pass on is highly questionable. Initially, when petitioner made known its unwillingness to pay an additional charge covering the mech fund assessment, the Association planned to sue it directly. And the device eventually adopted was a friendly suit between the Association and the terminal companies with the latter impleading petitioner. The inescapable inference would seem to be that the members of the Association regarded the obligation as ultimately that of the shipper, not the carrier or terminal company. This would be consistent with the traditional practice of the Association's members of passing on Association dues to shippers in the form of higher rates.

certiorari denied, 375 U.S. 830. The basic agreement to provide a mechanization fund in a certain amount for the benefit of the longshoremen would appear to be of this character. At issue, however, is something quite different: the agreement among the Association's members, implementing the contract with the union, to raise the fund required by the contract through a special assessment on the cargo handled by them. This side agreement apportioning the cost of the labor contract is not a part of that contract and involves no question of labor relations. The Association insisted, and the union accepted, that how the money was raised was no concern of the union. The union was satisfied with the Association's assurance that the money would be raised and no one suggests the Association cannot fulfill its obligation to the union by methods which do not violate the Shipping Act.

It is argued that collective bargaining negotiations in the shipping industry might be disrupted by the delays consequent upon obtaining the Commission's approval of a method for funding a particular benefit before any step to implement the method was taken.[8] But this unwarrantedly assumes that the Commission could not or would not act expeditiously in granting or withholding its approval of the method agreed upon. We assume, moreover, that ordinarily any challenge to such an agreement will concern only a particular and severable feature of it—here, the as-

[8] An agreement required to be filed under Section 15 may not be implemented until the Commission has approved it. See p. 5, *supra*.

sessment on automobiles—and that the Commission is free to approve promptly, and permit immediate implementation of, so much of the agreement as is not in dispute. This should minimize any disruptive effect on labor negotiations occasioned by the filing requirement.

There is a further point. Where, as in the present case, questions of legality apart from failure to file are raised, the agreement is under a cloud from the beginning anyway, whether or not it must be filed. An agreement such as that challenged here could violate the antitrust laws[8a] or other provisions of the Shipping Act (*infra*, pp. 10–12). Carriers and others might, therefore, decline to cooperate in carrying out such an agreement, fearing treble-damage liability. *Carnation Co.* v. *Pacific Conference,* 383 U.S. 213. In these circumstances, the processes of collective bargaining may be more helped than hindered by the availability of a procedure for removing legal uncertainty at the outset: filing the agreement with the Commission. If the Commission approves it, its consistency with the Act is established and antitrust immunity conferred, giving the parties a green light to implement it. The scheme of the Act is that maritime agreements raising serious regulatory issues should be scrutinized by Commission *in limine,* not left to later or piecemeal

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[8a] As an agreement determining how joint costs are to be passed on to customers, it could be regarded as a form of price-fixing illegal under the Sherman Act. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 221–224. That the joint costs originated in a collective bargaining agreement does not create an antitrust exemption. *Mine Workers* v. *Pennington*, 381 U.S. 657; *Meat Cutters* v. *Jewel Tea*, 381 U.S. 676.

challenge, and this seems to us a salutary policy in this as in other contexts.[9]

The question whether the agreement imposing the mech fund assessment must be filed under Section 15 is, of course, distinct from the merits of the agreement. If this Court holds that it must be filed, the Commission will be required to scrutinize its merits under the standards of Section 15. Quite apart from that section, however, petitioner argues forcefully that the agreement violates Section 17 of the Shipping Act, 46 U.S.C. 816.[10] We are not prepared at this stage to offer a definitive view on the legality of the agreement under this section. We do think, however, that the Commission's analysis was inadequate and that it should take a fresh look under proper standards when the matter is returned to it.

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[9] A holding that the agreement should have been filed would not, we believe, entail disruption of the mech fund, notwithstanding the provision of Section 15 (n. 8, *supra*) making unlawful the implementation of an agreement that is required to be filed before it is approved. We assume that the members of the Pacific Maritime Association, having paid the assessment voluntarily, will not seek restitution—and that if they did the Commission would exercise its discretion to deny them any such relief. *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 621–622.

[10] Petitioner also argues that Section 16 of the Act, 46 U.S.C. 15, was violated. It forbids persons subject to the Act to subject "any particular person, locality or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." The Commission held that Section 16 is violated only if there is a discrimination between competitors, and none here is suggested, the marine terminal companies having imposed no higher charge on Volkswagens than on other automobiles. The Commission's view is supported by

Section 17 requires every person subject to the Act to observe "just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property," and it seems clear that the conduct of the marine terminal companies in tacking on the mech fund assessment as an additional charge for unloading Volkswagens is within the purview of this provision, and hence unlawful if it is unjust or unreasonable. Petitioner established, we think, a *prima facie* case of the unreasonableness of the automobile assessment. It appears indeed disproportionate. On a weight basis, it is 10 times the assessment on other general cargo, 50 times the assessment on bulk cargo, and 100 times that on coastwise lumber. The assessment raises the cost of unloading Volkswagens by 22 percent, compared with an average of 2 percent for other cargo. And in deciding to assess automobiles on a measurement-ton basis the Commission departed from its general rule of computing the mech fund assessment on the basis of how the cargo is manifested. Yet, it is conceded that the mechanization which the assessment is to finance will do little to reduce the costs of unloading automobiles; the primary benefits will be received by other classes of cargo.

Perhaps the disparate and seemingly arbitrary treatment of automobiles can, nevertheless, be justified. But we think the Commission failed to do so

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the interpretation that has been placed on Section 3(1) of the Interstate Commerce Act, 49 U.S.C. 3(1), on which Section 16 of the Shipping Act is modeled. See *United States* v. *Great Northern Ry. Co.*, 301 I.C.C. 21, 26–27.

in its opinion. It stressed that no intention to discriminate against petitioner had been shown—but surely that is not required to predicate a finding of unreasonableness. It seems equally wide of the mark that petitioner will realize some benefits from the mechanization program, since they are conceded to be disproportionately small. And even if, as the court of appeals suggested (Pet. App. A, 24a–25a), "a generally reasonable rule for assessing benefits may be maintained though it produces some instances of burdens wholly disproportionate to benefits," that precept seems inapplicable here. For the complaint is not that petitioner fares badly under a uniform rule of general applicability; it is, rather, that in assessing automobiles the Association departed from its general rule of following the manifest, instead devising a special rule limited to automobiles. No reason appears why it would have been impracticable to have assessed automobiles on some basis that would have brought them more into line with other general cargo.

At all events, a question of general importance is presented concerning the circumstances and standards under which one type of cargo or one class of shippers may be required to bear more than its pro rata share of an industry joint cost. This is additional reason why review by this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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